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No. 320. 79

Affidavit for Appt.

RECEIVED
NOV 6 1899
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 6, 1899.

No. 320.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,

Appellant,

vs.

WIRT ADAMS, State Revenue Agent, *et als.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

AFFIDAVIT OF EDWARD MAYES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

STATE OF TENNESSEE,
Shelby County.

Personally appeared before me Sam Holloway, a Notary Public, in and for the State and County aforesaid, Edward Mayes, an attorney at Law of Jackson, Mississippi, who, being by me duly sworn on oath, says:

That on the 25th day of April, 1899, Wirt Adams, State Revenue Agent of the State of Mississippi, did bring in the Circuit Court of the County of Hinds, State of Mississippi, First District thereof, two suits against the Yazoo & Mississippi Valley Railroad Co., and the Illinois Central Railroad Co., whereby he demanded and sought to recover in the one suit, certain taxes assessed for the year 1898, by the Railroad Assessors for the State of Mississippi, against the property which had formerly been property of the Louisville, New Orleans & Texas Railway Co., amounting to about Ninety-five Thousand ($95,000) Dollars,—and in the other, certain other taxes for the year 1898, assessed by the State Railroad Assessors against the property which had formerly been the property of the Natchez, Jackson & Columbus Railroad Co., amounting to about Fifteen Thousand ($15,000) Dollars; that the said taxes so sued for were the same identical taxes as to which the Yazoo & Mississippi Valley Railroad Co. had theretofore filed its bill of injunction in the Circuit Court of the United States, at Jackson, Mississippi,—in which bill such proceedings were had, that the same was by the said Court dismissed on the first Monday of May, 1899,—from which decree of dismissal the said Yazoo & Mississippi Valley Railroad Co. took an appeal to the Supreme Court of the United States, which appeal is now pending in said Supreme Court of the United States, and is numbered 320

on the Docket for the October term, 1899; that in the said suits at law hereinbefore mentioned, such proceedings were had, that at the June term of said Circuit Court, judgments were duly rendered against the defendants to the full amount of the taxes demanded; that in each of said suits the said defendants duly prayed an appeal to the Supreme Court of the State of Mississippi, with supersedeas, which was granted on the execution of the usual supersedeas bond in double the amount in each case of the judgment recovered; that said supersedeas bonds were duly executed and approved, and the said causes and judgments so superseded are now pending in the Supreme Court of the State of Mississippi, un-determined.

EDWARD MAYES.

Sworn to and subscribed before me this the 30th day of October, 1899.

SAM HOLLOWAY,
Notary Public.

[NOTARIAL SEAL.]

No. 320. 79

SUPREME COURT U. S.
FILED
NOV 6 1899
JAMES H. McKENNEY,
Clerk.

Brief of Guthrie, Fentress & Mayes for Appt.

MISSISSIPPI TAX CASES.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 6, 1899.

No. 320.

ON MOTION TO DISMISS OR AFFIRM.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY
Appellant,
vs.
WIRT ADAMS, State Revenue Agent, *et als.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
EDWARD MAYES,
Of counsel for appellant.

WASHINGTON, November 6, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 320.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,
Appellant,

vs.

WIRT ADAMS, State Revenue Agent, *et als.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

This motion involves substantially the same points as are made in the motion for the same relief in No. 318, although the records in the two cases are not altogether alike. Counsel for the appellant pray they may refer to their brief filed in opposition to the motion in No. 318, one of the same series of cases, so far as it covers the ground of this motion, merely replying here to such portions of the additional brief filed by Messrs. Calhoon and Green as seem to require attention. This course will save the labor of the court and avoid unnecessary repetition.

Jurisdiction is not claimed by reason of diversity of citizenship, for the case, like No. 318, is one arising under the Federal Constitution. In substance, the bill alleges the incorporation by the Mississippi legislature of the Natchez and Jackson (afterwards Natchez, Jackson and Columbus) Railroad Company by act ap-

proved July 21, 1870 (record, p. 2); the passage of an act on August 8, 1870, extending to the Natchez and Jackson Railroad Company the privileges of section 21 of the charter of the Mobile and Northwestern Railroad Company (*id.* p. 3), and the provisions of said section 21 which are as follows:

> "SEC. 21. *Be it further enacted*, That in consideration of the construction of the Railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said Railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said Company, (AND WHICH AGREEMENT IS IRREPEALABLE), that all taxes to which said Company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said Company may have incurred in the construction of said road, or for money borrowed by said Company, upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said Company in constructing the same; and it shall be the duty of the Tax Collector in every county in each and every year, to give to said Company a receipt in full for the amount of said taxes upon receiving from said Company an affidavit made by the President or Cashier of said Company, that the amount of said taxes have actually and in good faith been paid and applied by said Company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said Company shall be subject; *provided, however*, That, whenever the profits of said Company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said Company to the Tax Collector, to be by him paid over as required by law."

It is then alleged that the Natchez and Jackson Railroad Company, in reliance upon the provisions of section 21,

1004

expended large sums of money in the construction of its road and incurred a construction debt evidenced by bonds to the amount of $1,250,000. The provisions of section 21, so accepted by the Natchez and Jackson Railroad Company, are alleged to have constituted a contract between it and the State of Mississippi for the appropriation of the amount of the taxes to the payment of the construction debt, irrepealable for thirty years from August 8, 1870. For such purpose during each year a receipt for the taxes was required to be given to the railroad company upon proof of the appropriation thereof as required by section 21 (*id.*, p. 3).

The bill then stated the incorporation of the Memphis and Vicksburg Railroad Company on August 8, 1870; the act of March 3, 1882, authorizing consolidation between the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company "with all the rights, privileges, immunities, franchises," etc., of the constituent companies (*id.*, p. 4); the amendatory act of March, 1884, by which the Memphis and Vicksburg Railroad Company was authorized to consolidate with any other railroad company or companies, and entitling the company so formed to the same rights, immunities, etc., given by the act of March 3, 1882. It was provided by section 5 of the act of March 3, 1882, that the provisions of section 21 of the Mobile and Northwestern charter should apply to any company consolidated under its provisions (*id.*, p. 5).

It was further set forth that under the acts of 1882 and 1884 the Memphis and Vicksburg Railroad Company and the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company were consolidated so as to become the Louisville, New Orleans and Texas Railway

Company, and that under the charters of its constituent companies this company constructed the railroad contemplated thereby. It was stated that the consolidated company was organized in reliance upon the provisions of the act of 1882, including section 21, which had been extended to it; and that section 5 of the act of 1882 above referred to constituted a contract between the State of Mississippi and the consolidated company of the same effect as already alleged in respect of the Natchez and Jackson Railroad Company (*ib.*).

It was then shown that in 1890 an act was passed authorizing the Natchez, Jackson and Columbus Railroad Company to sell its railroad, together with all its franchises, privileges and immunities, and that in pursuance thereof it afterwards sold to the consolidated company its railroad, with its franchises, privileges and immunities, subject to the aforesaid construction debt of $1,250,000. Afterwards the consolidated company bought the bonds representing this construction debt for $890,000 of its own first mortgage bonds secured by a mortgage on its entire line of railroad, and used the $1,250,000 bonds of the Natchez, Jackson and Columbus Railroad Company as collateral security for its first and second mortgage bonds (*id.*, p. 6).

The bill alleged that the complainant was incorporated by special act approved February 17, 1882, and that on October 24, 1892, the Louisville, New Orleans and Texas Railway Company and the complainant pursuant to the authority conferred by their respective charters effected a consolidation whereby the former company was merged into the complainant company and "all of the property, real and personal, and all of the rights, franchises, privileges and immunities" of the former company, "including as

part thereof all the property, real and personal, all of the rights, franchises, privileges and immunities that had been of the Natchez, Jackson and Columbus Railroad Company were transferred to and became the property, rights, privileges, franchises and immunities" of the complainant; and that among the latter were the contract rights of the Natchez, Jackson and Columbus Railroad Company under section 21 of the Mobile and Northwestern charter, and the rights thereunder of the Louisville, New Orleans and Texas Railway Company as acquired by the sales and consolidations already set forth. It was stated that the complainant from the date of the consolidation had by virtue of these contracts been entitled to the "full exercise and enjoyment of the rights aforesaid by the legislation aforesaid contracted and conferred" (*id.*, pp. 6, 7).

It was shown that the state railroad commission had assessed the property originally of the Natchez, Jackson and Columbus and of the Louisville, New Orleans and Texas Companies for the taxes of 1898 under the provisions of the chapter on revenue of the Mississippi Annotated Code of 1892; that the complainant had the right to pay said taxes by appropriation of the amount thereof under the provisions of section 21 and by making the necessary affidavit of the application in conformity with the statute; that it had so appropriated and applied the amounts of taxes assessed against the respective properties, and had tendered the statutory affidavits; but that the defendants, the state revenue agent and the sheriffs of the various counties, disregarding the complainant's contract rights, and claiming the payment of the taxes in currency, were about to attempt the collection of the taxes imposed by multiplicity of suits and seizures (*id.*, pp. 8, 9). It was

alleged that the assessments thus made constituted a lien which had really been satisfied and discharged in full, and that the claims of the sheriffs and the state revenue agent constituted a continuing cloud upon the complainant's title; that the complainant could not pay the taxes under protest and then sue to recover them back without being subjected to a multiplicity of suits; that in case of payment there was doubt as to the possibility of recovering the amounts paid to the different municipalities and counties, and that a suit against the state for that purpose would be unavailing (*id.*, p. 9).

It was expressly alleged that the threatened action of the defendants was to be taken under the revenue law passed in 1892 and under the act of 1894 defining the office and powers of the state revenue agent, both of which were subsequent to the legislation already recited conferring the right to appropriate the taxes to the payment of the construction debt and in violation of section 10 of Article I. of the Constitution of the United States (*id.*, p. 10). The decision of the Supreme Court of Mississippi in *Railroad Co.* v. *Lambert*, 70 Miss. 779, 790, wherein that court sustained the rights claimed under the Natchez, Jackson and Columbus charter, as extended by the provisions of section 21, was referred to as *res adjudicata* upon the claims of the defendants (*id.*, p. 11). It was also alleged that sections 180 and 181 of the state constitution of 1890 were an impairment of the contract rights of the complainant (*ib.*).

The prayer of the bill was, in substance, for an injunction against the bringing of suits for the recovery of the taxes or seizing the defendant's property therefor, "or taking any steps or proceedings whatever for the collection and recovery of such taxes;" that it be adjudged that the

complainant's property was under no liability for the taxes; and that the cloud arising from the assessment be removed from the title of the complainant to its property; and for further relief (*id.*, p. 13).

A restraining order having been granted, the same was afterwards discharged by interlocutory order on the ground that the Circuit Court had no jurisdiction of the cause (*id.*, p. 51). An appeal from this order was dismissed by the Circuit Court of Appeals upon the ground that that court had no jurisdiction of the appeal (*id.*, p. 56). A final decree was then entered in the Circuit Court dismissing the bill (*ib.*), from which the complainant took an appeal to this court, assigning as error the action of the court in dismissing the bill for want of jurisdiction. The order granting the appeal stated: "This appeal is granted solely upon the question of jurisdiction, *this court having refused to assume jurisdiction in this cause*" (*id.* p. 58). During the same term the Circuit Court certified at length as to the issues and the proceedings in that court, the certificate concluding as follows:

> "Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the ground hereinbefore stated, namely:
>
> "(1) That the complainant by its original bill showed no jurisdiction in this court because of the subject matter stated, inasmuch as the bill set forth no proper Federal question.
>
> "(2) That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment to the Constitution of the United States" (*id.*, pp. 62, 63).

BRIEF.

As stated on page 1, our brief in No. 318 answers the various points made by the appellees on this motion.

There are, however, additional points urged in support of the present motion, and these additional points will now be discussed so far as it appears necessary to answer them. For convenience we shall follow the numbering of the brief filed by Messrs. Calhoon and Green and answer the points that merit attention.

1 and 3.

The certificate states the two questions of federal jurisdiction in the clearest possible way. It could not have framed those questions more explicitly. *Colvin* v. *Jacksonville*, 158 U. S. 456, 459. The restraining order was discharged for want of jurisdiction (record, p. 51), and the appeal to this court was prayed and allowed upon the same ground (*id.* p. 58).

5, 6, 7 and 8.

It is idle to contend that the appellant had an election, after the making of the order denying the motion for an injunction *pendente lite*, whether to appeal to the Circuit Court of Appeals or to this court. The order was in no sense a final decree. It did not purport to dismiss the bill, but left the suit still pending for further proceedings. In the only case cited which seems to support the claim the *bill had been actually dismissed*. *Railway Co.* v. *Railroad Co.*, 117 Ill. 611, 614. It is true that the grounds of the order denying the injunction may have been such as to indicate that the final decree would go against the complainant; but until that final decree was made, there was nothing on which to base an appeal to this court, and hence there could be no election. There is no question or danger of two appeals at the same time from the same decree. The Act of March 3, 1891, as amended by the Act of February 18, 1895 (28 Stat. 666), expressly provides for an appeal

1005

from such an interlocutory order as was made in this cause; and nothing in the act indicates that it was intended to cut off an appeal from a final decree when rendered. That result could only occur if the Circuit Court of Appeals should exercise any authority conferred upon it by the Act of 1895 to determine the whole case finally on an appeal from an order discharging a temporary injunction. In any event, the Circuit Court of Appeals had no jurisdiction of the only appeal taken to it; and that can hardly be said to have been an election which resulted in no hearing or adjudication upon the merits.

The entry of the final decree brought the appellant's case precisely within the first conclusion tabulated by the Chief Justice in *United States* v. *Jahn*, 155 U. S. 109, 114, as follows: "(1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court." The case is not included in any one of the other four divisions into which the subject is divided in this opinion.

But the main point is that, whatever revisory power the Circuit Court of Appeals might have exercised, and whatever form of decree it might have entered, its appellate jurisdiction was not exercised in fact, and its decision upon the question of its own jurisdiction left the cause precisely where it was when the appeal from the interlocutory order was taken. That court said:

> "We express no opinion on the question of the jurisdiction of the circuit court, further than to say that the constitutional questions on which we base our conclusion as to the appellate jurisdiction of this court were necessarily considered in reaching a decision on the question of the jurisdiction of the circuit court. This much seems pertinent, if not necessary, in view of

the fact that the interlocutory orders of the circuit court recite that, in its opinion, it was without jurisdiction of the cases. The appeals are dismissed." *Illinois Cent. R. Co.* v. *Adams*, 93 Fed. Rep., 852, 856.

9

The question as to the existence of a contract as well as its true construction has been in all cases determined by this court independently of the decisions of the state courts, and in some cases in direct opposition to the rulings of those tribunals. *McCullough* v. *Virginia*, 172 U. S. 102, 109; *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 487. In no class of cases has this court oftener exercised this power to determine for itself the existence of an alleged contract than in the long line of decisions involving so-called exemptions or immunities from taxation.

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It is difficult to see how the Circuit Court of Appeals could have certified any question to this court excepting that of its own jurisdiction. *Green* v. *Mills*, 25 U. S. App. 383, 392, read in connection with *Carey* v. *Houston & Texas Central Railway*, 150 U. S. 170, 181, rules that where the federal question is not controlling, the Circuit Court of Appeals may take jurisdiction and decide the case on non-federal points. There is a radical distinction between such a case and the case at bar. Here the federal question was treated as controlling by the Circuit Court of Appeals. That court said:

"By the averments of the bills, nothing is left to inference as to the complainants' claims raising other constitutional questions. The gravamen of each case is that the complainant is being deprived of contract rights secured by the constitution of the United States. The claim in each case is that the complainant is entitled by contract to be exempted from paying certain taxes,

1005

and that, pursuant to statutes of the state of Mississippi passed subsequent to the charters or contracts in question, the officers of the state are proceeding to assess and collect these taxes,—and that to do this would deprive the complainant of rights secured by the constitution of the United States. * * * *The court that renders final decrees in these cases must, either directly or indirectly, decide these constitutional questions.*" 93 Fed. Rep. 856.

Entertaining these views the court necessarily refused to retain jurisdiction of the appeal. Upon the question of the jurisdiction of the Circuit Court of Appeals see *Hamilton* v. *Drisdale's Executors*, 2 U. S. App. 540, 546; *City of Macon* v. *Georgia Packing Co.*, 13 U. S. App. 592, 595; *Chicago, Milwaukee, &c., R'y Co.* v. *Evans*, 19 U. S. App. 233, 235; *Hastings* v. *Ames*, 32 U. S. App. 485, 487; *Town of Westerly* v. *Westerly Water Works*, 33 U. S. App. 723, 729; *Barr* v. *New Brunswick*, 39 U. S. App. 187; *Holt* v. *Indiana Manufacturing Co.*, 46 U. S. App. 717, 719; *Indianapolis* v. *Central Trust Company*, 53 U.S. App. 658, 664; *Pauly Jail Building Co.* v. *Crawford County*, 56 U. S. App. 53; *Wrightman* v. *Boone County, Arkansas*, 60 U. S. App. 100, 103.

Although the Circuit Court of Appeals might have considered the entire case on the merits and rendered a final decree if it had retained jurisdiction, it did not do so, and there has been no final adjudication or decree except that rendered by the Circuit Court. Under no possible construction of the acts conferring juridiction could this court have entertained an appeal from the interlocutory order vacating the injunction. *Kirwan* v. *Murphy*, 170 U. S. 205, 210.

II.

The Circuit Court refused to continue the restraining order because it had no jurisdiction. The Circuit Court of Appeals declined to review this order because it in turn

had no jurisdiction, the case being one in which an appeal from the final decree should be taken exclusively to this court. In view of these two facts, there having been no decision by any court upon the merits, it is not candid to say that the proceedings below have "left adjudged * * every question within the appellate jurisdiction of the Court of Appeals presented by the record." Nothing has been adjudged except the lack of jurisdiction of each court. It is indeed doubtful if a writ of certiorari would have been issued by this court to review the order dismissing the appeal. *In re Tampa Suburban Railroad Company*, 168 U. S. 583, 587. We do not now attack the adjudication of the Circuit Court of Appeals. On the contrary, we attempt to follow its ruling that this cause involves the application of the Federal Constitution and the validity of state laws claimed to be in contravention of the Constitution of the United States. It follows that the case is one arising under that instrument, and by reason of its subject matter is within the jurisdiction of the Circuit Court.

13, 14 and 15.

The disclaimers by the tax collectors only convict them of neglect of the duty attempted to be imposed by the revenue law of 1892. Section 3884 of the Annotated Code of that year provides as follows:

> "The tax-collectors shall collect the railroad tax from said roads in all respects as *he* collects other taxes; but in case of a sale for delinquent railroad taxes, the collector shall first seize and sell personal property or lands other than the roadbed; and, secondly, rolling stock; and, lastly, the roadbed of the railroad in his county."

Section 3802 of the same code provides:

> "All taxes remaining unpaid on the 15th day of December, shall immediately be collected by the collector, by distress and sale of any personal property liable therefor."

Moreover, the appellees' counsel in making these

1005

points have strangely overlooked the provision of the revenue law (Annotated Code, sec. 3746) which declares that "all taxes assessed shall be a lien upon and bind the property assessed, from the first day of February of the year in which the assessment shall be made; * * * the taxes shall be a charge on the land or personal property taxed." The tax was, therefore, much more than a mere "personal liability," and the complainant was entitled to invoke the jurisdiction of a court of equity, not only to prevent the multiplicity of suits with which the state revenue agent threatened it, but also to remove the cloud on its title caused by the lien, and to restrain the distress and sale which the statute required the state officials to make.

16 and 17.

We decline to consider as seriously made the assertion that the state railroad commission is a judicial tribunal whose proceedings are entitled to such weight as to override the contract clause of the Federal Constitution.

18.

The real ground of jurisdiction is that this is a case arising under the Constitution of the United States. "All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair. * * * Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one." *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S.

557, 563, 564. The jurisdiction being thus settled, we shall not attempt to follow the inconsistent argument by which counsel attempts to drag this court into a premature consideration of the merits of the case on the pretense of want of jurisdiction. These questions are involved in the pending writ of error No. 244, where the court upon a similar motion to dismiss has postponed the consideration of these questions to the hearing upon the merits.

As to the second main ground, we do not understand that until now any one was ever supposed to claim that the Eleventh Amendment *conferred* jurisdiction of any case.

The last additional point refers to the subsequent judgment in the state court as a "bar to the further prosecution of this appeal," not apparently for the reason that the judgment of the state court makes this appeal unavailing, but because that judgment has entirely deprived this court of power to hear and determine the appeal. Such an application of the rule of *res adjudicata* to the case at bar would result in a perversion of the jurisdiction of the federal courts. It is impossible for the appellant to gain redress for the judicial impairment of its contract in the courts of Mississippi except by the grace of those tribunals. This court has no jurisdiction of a writ of error to the state court based merely upon such a judicial impairment, the jurisdiction under the contract clause of the Federal Constitution being limited to cases of legislative impairment. But in a case like the present, within the original jurisdiction of the Circuit Court of the United States, that court has power to determine the existence of the contract and to construe its terms in accordance with the laws of the state as declared at the time the contract

10055

was made, independently and in disregard of any subsequent change of judicial opinion; and an appeal in such a case brings to this court "the whole case, including the question how far the courts of the United States should follow the decisions of the highest court of the State." *Central Land Company* v. *Laidley*, 159 U.S. 103, 111. This is the question which the appellant asks to have determined in the administration of the original jurisdiction of the federal courts, and in this way it seeks immunity from the revolutionary consequences of the decision of the state court in the principal case (No. 244).

Being thus rightfully in the federal court, the appellant was cast forth from that forum by the erroneous refusal to assume jurisdiction of the cause. But this was not the end of the suit. It was forthwith removed to this court by appeal, which operated as a continuation of the cause and left it still, as it is now, a pending litigation. If, as we submit, the Circuit Court had jurisdiction of the suit and this court likewise has jurisdiction of the appeal, then the cause ought to be remanded to the court of original jurisdiction for a hearing and determination upon the merits. Under these circumstances, can it be possible that the appellees, in defiance of this appeal, can impair or rather nullify the jurisdiction of this tribunal by proceeding in a state court in the very teeth of this appeal, and successfully maintain that this subsequent proceeding has ousted the jurisdiction of the federal courts? In no other way can the precise question arising under the Federal Constitution be raised and determined in this court. "A denial of jurisdiction forbids all inquiry into the nature of the case" *Osborn* v. *U. S. Bank*, 9 Wheat. 738, 847. If that denial of jurisdiction was erroneous, we are now entitled as matter of right to a hearing

on the merits. To say that federal jurisdiction having once attached it can be destroyed or ousted by the subsequent action of any state court would leave suitors in the federal courts utterly without remedy, although their causes be within the constitutional jurisdiction of those courts. The doctrine of *res adjudicata*, originally established "to secure the peace and repose of society by the settlement of matters capable of judicial determination," and "essential to the maintenance of social order,"[1] would be subverted to a purpose farthest from peace, repose and social order, for under its guise a jurisdiction meant to be paramount would be frittered away by the unwarranted application of a technical rule never intended or permitted to work injustice, and we would have the state courts racing to enter judgment before this court could decide an appeal.

For the foregoing reasons it is urged that the question of jurisdiction should be reserved for full argument at the bar.

Counsel also submit that this whole series of Mississippi Tax Cases should be heard upon one argument, so that the whole question may be covered and disposed of at one time, and counsel will, therefore, move this court in due time to have these various cases heard together when the first case, No. 244, is reached for argument.

Washington, November 6, 1899.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
EDWARD MAYES,
Of counsel for appellant.

[1] *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 49.